IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO.524 OF 2005
IN
SUMMARY SUIT NO.1126 OF 2005

Mahindra Gesco Developers Pvt.Ltd. ....Plaintiff
V/s.
New India Exports Pvt.Ltd. ....Defendant

Mr.Virag Tulzapurkar, Senior Counsel with Ms.S. Surve i/b Little & Co. for the Plaintiff.

Mr.Shyam Mehta i/b Kanga & Co. for the Defendant.

CORAM : S.J. VAZIFDAR, J.
DATED : 1ST AUGUST, 2007.

P.C. :

1. The suit is filed to recover a sum of Rs.7,50,00,000/- with interest thereon at the rate of 18% p.a. from the date of the filing of the suit till payment and/or realization.

2. The amounts claimed in suit were due to a company Mahendra & Mahendra Ltd. Mahendra & Mahendra Ltd. assigned and transferred their rights in respect thereof to the Plaintiff pursuant to a scheme of arrangement sanctioned by this Court. The scheme of arrangement transferred inter-alia the said right to

and vested the same in Gesco Corporation Ltd. i.e. the previous name of the Plaintiff. There is and can be no dispute regarding the validity of the assignment and the right of the Plaintiff to sue the Defendant in respect of the said amounts.

3. The suit is based mainly on a writing dated 4.10.2000 executed by the Defendant in favour of Mahendra & Mahendra Ltd. (hereinafter referred to as "M. & M. Ltd."), which reads as under :-

> "Dear Sirs,
>
> We confirm that an amount of Rs.7,50,00,000/- (Rupees seven crores and fifty lacs only) due to you as per our books as on 30.9.2000 is correct and acceptable to us.
>
> For New India Export Pvt.Ltd.
> Sd/-
> Constituted Attorney"

4. The said amount of Rs.7,50,00,000/- had been deposited in two instalments of Rs.5,00,00,000/- and Rs.2,50,00,000/- on or about 1.10.1993 and 21.12.1994 in circumstances I shall state shortly.

5. It is important to note that the Defendant had also handed over the title deeds in respect of certain properties to M. & M. Ltd. as and by way of security for repayment of the said sum of

Rs.7,50,00,000/-. M. & M. Ltd. had given up the security and returned the documents to the Defendant. I will deal with the importance of the creation of the security while dealing with the Defendant's contentions. Suffice it to note at this stage that the creation of the security is not only not denied but specifically admitted in paragraph 13 of the affidavit in reply.

6. M. & M. Ltd. by its letters dated 29.2.1996 and 25.5.1996 called upon the Defendant to confirm the accounts between them as on 31.1.1996 and 31.3.1996. The letters stated that the balance in the account was Rs.7,50,00,000/- due by the Defendant to M. & M. Ltd. as on 31.1.1996 and 31.3.1996.

7(A). The Defendant admits having signed the balance confirmation letters dated 29.2.1996 and 25.5.1996 and confirmed the balance as requested. The balance was confirmed by the following similar endorsements by the Defendant at the foot of the said letters :-

> "We confirm that the amount of Rs.7,50,00,000/- due to you as per our books as on 31.3.2006 is correct and acceptable to

us."

(B). The importance of the above balance confirmation letters is that the Defendant admitted and acknowledged that the amounts were due and payable by them to M. & M. Ltd., to wit they admitted privity between themselves and M. & M. Ltd. qua the said deposit of Rs.7,50,00,000/-. The importance of this will be apparent while dealing with the Defendant’s contentions.

8. The Defendant also acknowledged the said amounts as due and payable in its balance sheets for the financial years 1.4.2001 to 31.3.2002 and 1.4.2002 to 31.3.2003. The acknowledgement is contained in Schedule 7 of the balance sheets which specify the current liability. The amount is specifically stipulated as Rs.7,50,00,000/- under the head of "earnest money deposit". There is no question therefore of the suit being barred by limitation.

9. As stated earlier, M. & M. Ltd. assigned all its rights in respect of the said amounts to the Plaintiff and the Defendant executed the said letter dated 4.10.2000 confirming that Rs.7,50,00,000/- was due by it to the Plaintiff.

10. Ultimately by their advocate's letter dated 29.3.2005, the Plaintiff stated some of the aforesaid facts and called upon the Defendant to pay the said amount with interest at the rate of 18% p.a. from the date of the letter till payment and/or realization.

11. That the Defendant did not reply to the said letter before the suit was filed is of no significance as the suit was filed only two days thereafter on 31.3.2005.

12. The above facts clearly establish the liability of the Defendant to pay the said amount of Rs.7,50,00,000/- to M. & M. Ltd. and now to the Plaintiff in view of the assignment by M. & M. Ltd. of its rights in respect thereof in favour of the Plaintiff.

13. Three defences were raised by Mr.Mehta, the learned counsel appearing on behalf of the Defendant. Firstly he submitted that the said letter dated 4.10.2000 does not imply a promise to pay. Secondly, he submitted that even assuming that the amount is to be repaid by the Defendant, it is not repayable to the Plaintiff. Thirdly, he submitted that the suit is

premature, the time for repayment not having arrived.

The said letter dated 4.10.2000 does not imply a promise to pay.

14. I am unable to agree with the first contention. By the letter dated 4.10.2000, the Defendant unconditionally confirmed that the said amount was due to M. & M. Ltd. as per its books as on 30.9.2000. This clearly is an implied, if not, an express promise to pay the said amount. There is no other meaning that can be ascribed to a party in a commercial transaction confirming to the other that an amount is due to it as per its books. In *Maniram vs. Rupchand 33 Ind. App. 165 (P.C.),* the Privy Council held : "An unconditional acknowledgement has always been held to imply a promise to pay, because that is the natural inference if nothing is said to the contrary". The judgment has been consistently followed including by the Supreme Court and this Court. *(See Hiralal & Brothers vs. Badkulal & Ors., AIR 1953 SC 225* and *Sun N Sand Hotel Ltd. vs. V.V. Kamat HUF, AIR 2003 Bom.168*.)

. Mr.Mehta was unable to suggest any other reason why the Defendant confirmed the amount as due

by it to M. & M. Ltd.

15. Prefacing the second and third defences, Mr.Mehta then contended that the matter was not as simple as the Plaintiff made it out to be in the plaint. With respect to Mr.Mehta, it is in fact a simple matter which, in order to avoid payment is sought to be complicated by a reference to the transactions between M. & M. Ltd. and one M/s.New Great Eastern Spinning and Weaving Company Ltd. (hereinafter referred to as the " N.G.E. Ltd.") and certain correspondence addressed by M. & M. Ltd.

Even assuming that the amount is to be repaid by the Defendant, it is not repayable to the Plaintiff.

16. Before dealing with the documents relied upon by Mr.Mehta, it is essential to note three important aspects of his case. Firstly, Mr.Mehta did not suggest, much less establish, that the Defendant was entitled to retain and appropriate the amount unconditionally. In other words, it is not the Defendant’s case that it is not bound ever to repay the said amounts. Secondly, Mr.Mehta fought shy of answering whom the said amount was repayable to if not

to M. & M. Ltd./the Plaintiff. Lastly, the question therefore of his satisfying the Court in what eventuality and pursuant to what agreement the amount would be repayable naturally did not arise.

17. The documents between the Defendant and M. & M. Ltd./the Plaintiff clearly establish that the Defendant was bound and liable to repay the said amount to M. & M. Ltd./the Plaintiff. What falls for consideration therefor is whether the following documents relied upon by Mr.Mehta suggest anything to the contrary. I think not.

18. Firstly he relied upon the minutes of the meeting held on 29.9.1993 between M. & M. Ltd. and N.G.E. Ltd. It was agreed between M. & M. Ltd.. and N.G.E. Ltd. that a property belonging to N.G.E. Ltd. will be jointly developed by them. It was further agreed that till a formal agreement was drawn up, a sum of Rs.5.00 crores would be paid by M. & M. Ltd. to N.G.E. Ltd. as an advance. Paragraph 11 of the minutes of the meeting also provide for refund of the said amount in the contingencies mentioned therein and the security for repayment as well.

19(A). Mr.Mehta then relied upon a letter dated

1.10.1993 addressed by M. & M. Ltd. to the Defendant forwarding therewith a cheque for the said amount of Rs.5.00 crores in favour of the Defendant.

(B). Pausing here, it is necessary to mention that Mr.Mehta admitted that a sum of Rs.5.00 crores was deposited by M. & M. Ltd. with the Defendant and not with N.G.E. Ltd., pursuant to an understanding between N.G.E. Ltd. and the Defendant. It is important also to note that Mr.Mehta did not specify the understanding between the Defendant and N.G.E. Ltd. He merely stated that there was "some understanding" between them.

20. Mr.Mehta then relied upon a letter dated 21.12.1994 addressed by M. & M. Ltd. to the Defendant. M. & M. Ltd. referred to certain meetings and what transpired thereat including that the Defendant had requested M. & M. Ltd. to disburse a further amount of Rs.2,50,00,000/- in addition to the said amount of Rs.5.00 crores. Under cover of the said letter, M. & M. Ltd. forwarded a cheque for the said sum of Rs.2,50,00,000/- stating that it was pursuant to the "specific understanding that this amount shall be repaid within three months or such date as may be extended by us at our

discretion ....." The details of the securities were also specified.

21(A). Finally Mr.Mehta relied upon the formal/final agreement dated 14.7.1995 that was executed between M. & M. Ltd. and N.G.E. Ltd. The agreement is referred to by the parties as the Composite Services Agreement (C.S.A.). M. & M. Ltd. is referred to in the said agreement as the "COMPANY" and N.G.E. Ltd. is referred to therein is the "OWNER". Clause 10 of the agreement relied upon by Mr.Mehta reads as under:-

> "10. The OWNER and the COMPANY agree that the financial arrangement for the construction shall be as under :
>
> (a) The COMPANY shall, with a view to guarantee and secure the performance of its obligations under this Agreement, and with a view to enable the OWNER to carry out and meet its financial obligations under the aforesaid Sanctioned Scheme as also to comply with and fulfill the requisite commitments in order to undertake and complete the proposed Project, pay to, and keep deposited with the OWNER, such sum as may be determined by the Arbitrator which determination shall be made immediately after the Municipal Corporation of greater Bombay sanctions the plans and the Commencement Certificate is issued for the proposed construction but not less than Rs.20,00,00,000/- (Rupees Twenty Crores only), as, and by way of, interest free deposit and

> such amount shall remain deposited with the OWNER till the completion of the performance of its obligations by the COMPANY under this contract and after the completion of the construction and after the sale of the constructed area and the full realisation of the sale proceeds, at the time of the final settlement of accounts, the amount of deposit shall be added to the amounts including the remuneration due to, and payable by, the OWNER to the COMPANY."

(B). Mr.Mehta submitted that the said amount of Rs.7,50,00,000/- formed a part of the total deposit referred to in clause 10(a) of the said agreement. This is so.

22. I do not see how these documents support Mr.Mehta's submissions. There is nothing in any of the documents which even remotely suggests that the amounts of Rs.7,50,00,000/- was not repayable to the Plaintiff/M. & M. Ltd. What is even more important is the fact that much after all these documents were executed the Defendant executed the letter dated 4.10.2000 and the balance confirmation letters dated 29.2.1996 confirming that the said amount was due to M. & M. Ltd. there is no explanation for this. It is not the Defendant's case that the documents were not to be acted upon.

23. As noted earlier, by the said writing dated 4.10.2000 addressed to M. & M. Ltd., the Defendant stated "we confirm that an amount of Rs.7,50,00,000/- (Rupees seven crores and fifty lacs only) due to you as per our books as on 30.9.2000 is correct and acceptable to us."

. Mr.Mehta's submission is also belied by the said confirmation letters dated 29.2.1996 and 25.5.1996, wherein also the Defendant confirmed the amounts as being due and payable to M. & M. Ltd as per its books of account.

24. If Mr.Mehta's contention was correct such acknowledgements/confirmations would never have been given. The confirmations/acknowledgements in that event would have been to N.G.E. Ltd. or to such other party that may have been entitled to the payment thereof and not to M. & M. Ltd. As I mentioned earlier, it was not the Defendant's case that it was entitled to retain the amount for itself.

25. The doubt, if any, in this regard is set at rest by the fact that the Defendant created a security in favour of M. & M. Ltd. If the amount was not

repayable to M. & M. Ltd. there would not have been any question of the Defendant creating a security in favour of M. & M. Ltd. It is important to note that it is not the Defendant's case that it created the security as a guarantor for the amounts due to the Plaintiff from N.G.E. Ltd. or any other party.

26. The submission is further belied by the fact that as regards the amounts deposited pursuant to clause 10(a) of the Composite Services Agreement with N.G.E. Ltd. similar confirmation letters were issued by M. & M. Ltd to N.G.E. Ltd. and at the foot thereof it was N.G.E. Ltd. that confirmed the balance. Thus N.G.E. Ltd. and the Defendant independently confirmed the balances separately due by them.

27. In the circumstances, it is clear that the Defendant had agreed to repay the amount to M. & M. Ltd and not to N.G.E. Ltd. It is also clear that the amounts had been deposited by M. & M. Ltd with the Defendant independently albeit pursuant to the request/direction of N.G.E. Ltd.

28. Faced with this, Mr.Mehta relied upon certain letters addressed by M. & M. Ltd./Plaintiff to

N.G.E. Ltd. which suggested that N.G.E. Ltd. is liable to repay the said sum of Rs.7,50,00,000/-.

29. It is correct that the Plaintiff did make a demand for refund of the said amount of Rs.7,50,00,000/- with N.G.E. Ltd. N.G.E. Ltd. and the Defendant are admittedly sister concerns although Mr.Mehta did not specify the nature of the connection between them. Merely because a demand may have been made wrongly, would not militate against the Plaintiff's claim against the Defendant if the Defendant is actually found to be liable. Further in the facts and circumstances of this case, the Plaintiff cannot really be blamed for seeking to recover the money from both the parties when there appears to be an effort by both N.G.E. Ltd. and the Defendant to avoid the claim.

. I am unable therefore to accept this defence either.

The suit is premature, the time for repayment not having arrived.

30. Mr.Mehta further submitted that in the circumstances the amount is not repayable till the

performance by M. & M. Ltd. of its obligations under the agreement and after the completion of the construction and the sale of the constructed area and full realization of the sale proceeds and at the time of the final settlement of accounts. I am unable to agree with the submissions.

31. The fallacy of this submission arises from the Defendant's attempt at incorporating the terms and conditions of the Composite Services Agreement in the transaction pertaining to the deposit of Rs.7,50,00,000/- by M. & M. Ltd. with the Defendant. There is nothing on record which even remotely justifies the same. From the above facts, it is clear that the amounts deposited by M. & M. Ltd. with N.G.E. Ltd. under the said agreement would be repayable only in accordance with the terms and conditions of the agreement between them.

32. If the parties had any such intention, the deposit by M. & M. Ltd. of Rs.7,50,00,000/- with the Defendant would have been accompanied by a writing or communication to that effect. There admittedly is none.

33. Moreover it is not even the Defendant's case

that there was such an oral agreement between M. & M. Ltd., N.G.E. Ltd. and the Defendant. Mr.Mehta however invites me to infer such a term considering the facts and circumstances of the case. I am not inclined to do so. It is not open to the Court to add such a term to a transaction when there was none.

34. In the circumstances, it cannot be said that the terms and conditions of the Composite Services Agreement extend to or are incorporated either implidely or expressly in the transaction pertaining to the deposit of Rs.7,50,00,000/- by M. & M. Ltd with the Defendant.

35. In the absence of any such term it must follow that what was agreed to between M. & M. Ltd. and N.G.E. Ltd. was that out of the entire amount to be deposited by M. & M. Ltd. with N.G.E. Ltd. a sum of Rs.7.50,00,000/- would be deposited by M. & M. Ltd. with the Defendant. Admittedly there are no transactions between M. & M. Ltd. or the Plaintiff and the Defendant other than of course the deposit itself. The parties have not stipulated the time for repayment. Repayment therefore must be on demand.

36. The doubt, if any, is removed by the

Defendant not even contending or admitting that in the event of M. M. & Ltd. fulfilling all its obligations under the Composite Services Agreement, the Defendant would refund the sum of Rs.7,50,00,000/- to the Plaintiff. This is rather curious. If according to the Defendant, the deposit was to abide by the terms and conditions of the Composite Services Agreement, surely the Defendant should agree that upon fulfillment thereon, they would repay the amount to M. & M. Ltd./the Plaintiff. It is further important to note that admittedly N.G.E. Ltd. and the Defendant are sister concern. They have not spoken with one voice. If this contention was correct surely N.G.E. Ltd. would have filed an affidavit to this effect.

37. I therefore, find that there is no defence to the suit.

. The Summons for Judgment is therefore made absolute and the Suit is decreed as prayed. Costs to be quantified as per rules.